

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT WINCHESTER

PHILLIP M. SMITH, )  
                        )  
Petitioner,         )  
                        )  
v.                    )              Case Nos. 4:04-cv 60 / 4:02-cr-45  
                        )              *Edgar / Lee*  
UNITED STATES OF AMERICA, )  
                        )  
Respondent.         )

**MEMORANDUM AND ORDER**

Petitioner Phillip M. Smith, a federal prisoner, has filed a *pro se* motion for post-conviction relief under 28 U.S.C. § 2255. The United States of America opposes the motion. The Court referred the case to Magistrate Judge Susan K. Lee for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). On December 1, 2006, Magistrate Judge Lee submitted her report and recommendation. [Doc. No. 8]. The parties have not timely filed any objections.

After reviewing the record, the Court **ACCEPTS and ADOPTS** the report and recommendation pursuant to 28 U.S.C. § 636(b)(1). Accordingly, the motion for post-conviction relief brought under 28 U.S.C. § 2255 shall be **DENIED and DISMISSED WITH PREJUDICE**.

Any appeal from this decision by petitioner Smith would be frivolous and not taken in good faith. Any application by petitioner Smith for leave to proceed on appeal *in forma pauperis* shall be denied pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a).

If petitioner Smith files a notice of appeal, it shall be treated as an application for a certificate of appealability which will be denied pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b)(1) because he has not made a substantial showing of the denial of a constitutional right.

A separate judgment will be entered.

SO ORDERED.

ENTER this the 16<sup>th</sup> day January, 2007.

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/s/ *R. Allan Edgar*

R. ALLAN EDGAR

UNITED STATES DISTRICT JUDGE